

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
W. R. Grace & Co., <u>et al.</u> ,	)	Case No. 01-01139 (JKF)
	)	Jointly Administered
Debtors.	)	
	)	

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Zonolite Attic Insulation Property Damage Claimants	)	
	)	
Appellants,	)	Case No. 07-mc-005 (RLB)
	)	
v.	)	
	)	Oral Argument: March 5, 2007 at 4 p.m.
W. R. Grace & Co., <i>et al.</i>	)	
	)	
Appellees,	)	

**MOTION OF THE DEBTORS FOR LEAVE TO FILE SUR-REPLY  
TO THE MOTION OF ZONOLITE ATTIC INSULATION  
PROPERTY DAMAGE CLAIMANTS FOR LEAVE TO APPEAL**

The Debtors respectfully request leave to file the attached sur-reply to the ZAI Claimants' motion for leave to appeal the ZAI Order (Dkt. No. 1). As demonstrated in the Debtors' objection (Dkt No. 2), the ZAI Claimant's original motion papers did not even attempt to meet the requirements for leave to appeal an interlocutory order. In fact, the three pages of argument in the motion did little more than summarily assert that the requirements for leave to appeal were met. (*See* Motion at 6-8). Only in their reply brief (Dkt. No. 4), did the ZAI Claimants attempt to support their request. Accordingly, Grace seeks to file a sur-reply to respond to the new arguments -- and to correct the various mischaracterizations -- raised in the ZAI Claimants' reply.

Although the ZAI Claimants' argue that they (1) listed what they believed to be the errors in the order and (b) "attached the bankruptcy court's order which clearly illustrates the errors on

its face.” (Reply at 3), that is not enough to demonstrate the requirements for leave to appeal. The party must support their assertions with arguments and authority. *See Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir.1993) (observing that appellants must set forth the issues raised on appeal and present an argument in support thereof, or the issues will be waived); *see also United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) (“We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived”).

The ZAI Claimants provided little argument or authority in their Motion. Instead, the ZAI Claimants waited until their reply to raise arguments which should have been raised in the Motion. It is well established that parties cannot raise arguments for the first time in a reply brief. *See Werner v. Werner*, 267 F.3d 288, 302 (3d Cir. 2001) (“A reply brief is like rebuttal-an opportunity for the appellant to ‘reply’ to arguments of the appellee, not to raise a new issue at a time when the appellee cannot respond. That is unfair.”); *Stern v. Halligan*, 158 F.3d 729, 731 n. 3 (3d Cir. 1998) (“A party cannot raise issues for the first time in a reply brief.”). Since the ZAI claimants raised new arguments in their reply, Grace requests the opportunity to respond to those new arguments.

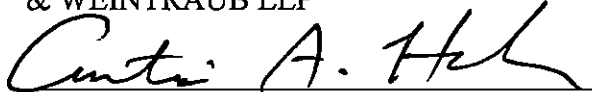
WHEREFORE, the Debtors respectfully request that the Court grant leave to file the attached sur-reply.

Dated: March 2, 2007

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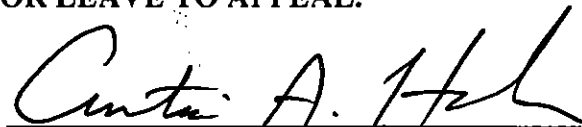
**IN THE UNITED STATES DISTRICT COURT  
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<hr/>		
Zonolite Attic Insulation Property	)	
Damage Claimants	)	
	)	
Appellants,	)	Case No. 07-CV-005 (RLB)
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v.	)	
	)	Oral Argument: March 5, 2007 at 4 p.m.
W. R. Grace & Co., <i>et al.</i>	)	
	)	
Appellees,	)	

**CERTIFICATE OF SERVICE**

I, Curtis A. Hehn, hereby certify that on the 2<sup>nd</sup> day of March, 2007, I caused a copy of the following document(s) to be served on the individuals on the attached service list(s) in the manner indicated:

**MOTION OF THE DEBTORS FOR LEAVE TO FILE SUR-REPLY TO  
THE MOTION OF ZONOLITE ATTIC INSULATION PROPERTY  
DAMAGE CLAIMANTS FOR LEAVE TO APPEAL.**

  
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Grace ZAI Appeal Fax Service List  
Case No. 01-1139 (JKF)  
Document # 125589  
22 - Facsimile

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Case No. 01-1139 (JKF)

Document Number: 123887

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